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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, *Petitioner,*
vs.
SHERMAN KIDWELL.

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, *Petitioner,*
vs.
DEWEY SMITH.

No. 784

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, *Petitioner,*
vs.
ALLEN COLLINS.

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FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, *Petitioner,*
vs.
HENRY STONE.

No. 789

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, *Petitioner,*
vs.
JEFFIE D. SULLIVAN.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

J. F. KEMP,
CLINT W. HAGER,
Counsel for Respondents.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

Statement of the Case.

The appellee was sentenced on July 10, 1934, in the United States District Court for the Southern District of West Virginia, to serve a term of two years in the penitentiary and was immediately thereafter sent to the United States Penitentiary in Atlanta, Georgia, for execution of said sentence. This sentence, with allowance for good conduct, expired on February 14, 1936, and appellee was conditionally released from the institution. At this time there remained one hundred seventeen days unexecuted of his maximum sentence which, under the terms of his conditional release, he was to be permitted to serve on parole. On March 26, 1936, he was declared to be a parole violator and a warrant was issued by Charles Whelan, a member of the United States Board of Parole, directing the rearrest of appellee, which warrant was in the following language:

> "And, whereas, satisfactory evidence has been presented to the undersigned member of this Board that said prisoner named in this warrant has violated the condition of his release and is, therefore, deemed to be a fugitive from justice.
>
> Now Therefore, this is to command you to execute this warrant by taking the said Dewey Smith, wherever found in the United States, and him safely return to the institution hereinafter designated.

Witness my hand and seal of this Board, this the 26th day of March, 1936.

CHARLES WHELAN,
Member, United States
Board of Parole.''

When apprehended communicate with Director of Prisons for instructions.

On May 29, 1936, appellee was returned to the United States Penitentiary in Atlanta, Georgia, under a warrant of committment issued by the United States District Court for the Eastman District of Kentucky, directing imprisonment for one year and one day. The parole warrant issued by the Parole Board and dated March 26, 1936, was transmitted to the United States Penitentiary in Atlanta, Georgia, on June 29, 1936.

On June 29, 1936, Mr. Ray L. Hugg, Parole Executive, wrote the Warden of the United States Penitentiary the following letter:

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS,
WASHINGTON.

June 29, 1936.

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

In re Dewey Smith, Old No. 44678-A,
New No. 48628-A. ZW.

DEAR SIR:

Enclosed herewith is copy of referral for consideration of alleged violation and violator warrant in duplicate for the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Smith into custody on the warrant at the expiration of his present sentence. The case should be listed for a hear-

ing on the violation charge only after the prisoner is in custody on the warrant.

When you have executed the warrant please return the original to this office, stating specifically that you are holding the prisoner as a violator and on the original commitment.

Very truly yours,

RAY L. HUFF,
Parole Executive.

The record, therefore, shows that appellee had been held under two sentences in the same penitentiary from May 29, 1936, to March 17, 1937, in execution of the year and a day sentence and from June 29, 1936, in execution of the remainder of his first sentence, amounting to one hundred seventeen days. If these ran concurrently appellee was entitled to his discharge on *habeas corpus* when he brought his writ on the 3rd day of April, 1937. If they did not run concurrently he was not entitled to his discharge at the time of bringing his writ. The government does not contend that there were any directions in either sentence as to sequence of service (R-7 and 8).

The identical question presented above is presented in the cases of

Zerbst v. *Kidwell,*
Zerbst v. *Allen Collins,*
Zerbst v. *Walter Owens,*
Zerbst v. *Frank Peel,*
Zerbst v. *Bennie Jones,*
Zerbst v. *Henry Stone,*
Zerbst v. *Jeffie D. Sullivan.*

The only material distinction between these named cases and the *Dewey Smith* case is that Dewey Smith was sentenced from different District Courts. In all of the other cases the same court imposed both the first and the second sentences. The Government concedes that the questions

involved in all of the said cases are precisely the same and deals with all of said cases in one brief.

The attorney filing this brief was appointed by the District Court to represent the appellees in all of the above named cases and following the example of the Government attorneys will file but one brief.

Question Presented.

Whether in a case where a parole violator has been returned to the penitentiary on a second sentence for an offense committed while he was on parole and he is also held as a parole violator to serve the balance of his maximum sentence imposed on his first conviction and where both commitments are silent as to the sequence in which said sentences shall be served, do they run concurrently?

Argument and Citation of Authorities.

What authority did the Warden of the United States Penitentiary have to hold appellee as a prisoner either in his first or second case? It was not by virtue of any verdict, judgment or commitment of an Administrative Board called a Parole Board, but the sole authority of the Warden to detain appellee and deprive him of his liberty was derived solely from two commitments representing two judgments of the District Court of the United States. The above proposition is fundamental and will clarify the issues in this case.

Now let's look at these judgments and commitments and determine from them whether the sentences imposed on appellee shall run concurrently or consecutively. Admittedly both commitments are silent as to whether the sentences shall run consecutively or concurrently and gives no direction as to the sequence of service of the same. This being true the uniform rule is that the prisoner is permitted to serve his sentences concurrently. This principle is so

well established that it is not deemed necessary to cite any cases in reference thereto.

When appellee was returned to the penitentiary as a parole violator under a warrant issued by the Parole Board, he immediately resumed service of his original sentence under the original commitment in the hands of the warden. When a prisoner violates his parole and a warrant is issued for his arrest as a parole violator, he then and there becomes an escape and a fugitive.

Anderson v. *Corall,* 263 U. S. 193.

The running of his sentence is only tolled until he is retaken, otherwise the sentence is in effect.

Aderhold v. *McCarthy,* 65 F. (2d) 452.

Now let's apply these principles of law to the instant case. Appellee was sentenced to serve two years in the penitentiary on his first sentence. He served that sentence in the penitentiary until he was conditionally released on February 14, 1936. On March 26, 1936, a parole warrant was issued for retaking the prisoner as a conditional release violator. He then and there became a fugitive and an escape. When he was retaken the service of his sentence immediately began again and no device, trick or subterfuge of the Parole Board could prevent the service of his sentence being resumed when he was retaken.

In the case of

Aderhold v. *McCarthy, supra,* 65 F. (2d) 452,

the court said:

> "McCarthy, therefore, in serving four years has served all his sentences unless his escape puts another face on the matter. That fact, of course, stopped the running of his first sentence until he was again taken into custody, but did not otherwise affect it. There was a recapture, no need to resentence him but only to put him in the penitentiary. * * * When Mc-

Carthy was incarcerated he was under lawful custody under either sentence and, therefore, under both."

The *McCarthy* case is squarely on all fours with the case at bar and this Court cannot reverse appellee's case without reversing the *McCarthy* case. In the *McCarthy* case the warden of the penitentiary attempted to do exactly what the Parole Board is attempting to do in this case. McCarthy was convicted in the District Court of Vermont on May 16, 1929, and given a sentence of a year and a day. Before reaching the penitentiary he escaped and in the following month, in New Hampshire, repeated his offense and on September 29, 1929, was sentenced to a term of four years in the penitentiary. He served his four year sentence and the warden then attempted to incarcerate him on the commitment which he held for a year and a day for the offense committed in Vermont. The original pleading in the *McCarthy* case will show that the warden did not have in his possession the commitment issued from the District Court of Vermont until the very day that McCarthy was to be discharged on his four year sentence. It makes no difference whether the accused became an escape through the violation of his parole by the escaping from the United States Marshall. When he is retaken his sentence then and there begins to be executed.

> "Where accused is sentenced to the penitentiary by a different court without any provision for one sentence to follow the other, each sentence runs from the prisoner's date of entry into prison, and prisoner would be entitled to discharge upon expiration of longest term.
>
> "Prisoner's escape after sentence to federal penitentiary stopped running of sentence until he was again taken into custody but did not otherwise affect sentence, resentence being unnecessary on his recapture."

The *McCarthy* case seems to be the settled law.

Zerbst v. *Lyman* (C. C. A. 5), 255 Fed. 609;
White v. *Kwaitkowski* (C. C. A. 10), 60 F. (2d) 265.

The fact that the first sentence was, at the time of parole, being served in a different institution, is as held by the Circuit Court of Appeals for the Tenth Circuit in *White* v. *Kwaitkowski*, 60 F. (2d) 264, wholly immaterial, for as the court said,

> "To hold otherwise is to hold that the Attorney General may, by transfer to the reformatory, change concurrent to consecutive sentences but he has no such judicial power * * * the new Board (Parole Board) had no power to return the appellee to Chillicothe and did not attempt to do so. The remainder of the first sentence was served at Leavenworth and was satisfied."

If the trial court did not, in the case at bar, make the sentences run concurrently, how can the maneuvers and manipulations of a mere Administrative Board, called a Parole Board, change the sentences of a court? With the present system of identifying and finger printing prisoners the District Court in the Eastern District of Kentucky presumably knew of the previous conviction of appellee in the Southern District of West Virginia and if he had wanted the prisoner to serve consecutive sentences he could have made his sentence to commence and to take effect upon the expiration of the sentence imposed by the West Virginia Court.

Miketich v. *United States*, 72 F. (2d) 550.

In the Government's brief they envision some fanciful difficulties in permitting a court to pass a sentence for a second offense on a parole violator to take effect and to start at the expiration of the first sentence and say that the second sentence would begin and take effect on a contin-

gency. All consecutive sentences are based on contingencies, for instance, where several counts are in an indictment and concurrent sentences are imposed on each count, each sentence to begin at the expiration of the sentence on the previous count. There is always the contingency that some count may be reversed by the Court of Appeals or that the prisoner may be pardoned on some count but no practical difficulty results.

Miketich v. *United States, supra,* 72 F. (2d) 550.

Title 18, Section 716-B, provides in substance:

> That when any prisoner is conditionally released from the penitentiary and good conduct allowance, "shall upon release be treated as if released on parole and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence."

Title 18, Section 723-C, U. S. C. A., provides in substance:

> That the Board of Parole shall have authority to issue a warrant for the retaking of prisoners who violate their parole. "The unexpired term of imprisonment of any such prisoner shall begin to run from the date of his return to the institution. * * *."

How can the Parole Board violate this plain and unambiguous statute of Congress and attempt to hold a prisoner in the penitentiary for a period of years after he is returned as a parole violator and to maintain that by merely denying him the right of a hearing that the execution of his sentence is to be deferred? It makes no difference if the Parole Board, either through negligence, viciousness or misguided zeal, never gives the returned parole violator a hearing as required by law, Congress has provided in unmistakable terms that his sentence shall resume its running "from the date he is returned to the institution."

If the Parole Board holds a hearing under Section 719 of Title 18, U. S. C. A., they cannot resentence the prisoner, they cannot change the terms of his original commitment, they cannot change the effect of his original sentence, they can only modify or revoke their own order of termination of parole and if they never give the prisoner a hearing his sentence resumes its running upon his return to the institution and when the maximum time provided in his commitment has been served he is entitled to release whether the Parole Board have acted or not acted on his case. They cannot change the judgment of the court. They have no judicial function, they are a mere Administrative Board.

Section 709-A of the Title 18, U. S. C. A., was passed by Congress in 1932 and provided that sentence of a prisoner should begin to run when he is committed to a jail or other place of detention to await transportation to the penitentiary. This Section was passed because it was common knowledge that United States Marshals removed prisoners to the penitentiary at their own convenience and often left them in jail awaiting removal for periods of months and when finally removed and received at the penitentiary they got no credit for the time that they remained in jail resulting from the laziness, negligence or viciousness of an Administrative Officer. This statute was passed to correct such a situation.

Section 723-C of Title 18, U. S. C. A., was passed by Congress and provided that a prisoner returned to an institution as a parole violator should be entitled to have execution of his sentence resumed and to begin to run from the date of his return for the reason that Congress did not intend that a mere Parole Board should hold a prisoner through negligence or viciousness, awaiting a hearing on the revocation of his parole over an extended period of time and cause him to serve, thereby, time for which he would not get credit.

Let's assume in the case at bar that appellee had never been convicted of any second offense but that he had failed to make his monthly reports promptly and that the Parole Board had issued a warrant for his arrest and caused his return to the penitentiary as a parole violator and although he had but one hundred seventeen days to complete the full sentence imposed by the court, the Parole Board denied him a hearing for a period of five years at the end of which time they formally met, revoked his parole and forced him to serve one hundred seventeen days plus the five years he served awaiting a hearing. It was to avoid such absurdity that Congress provided in Section 723-C of Title 18, U. S. C. A., that when a parole violator is returned to the institution the service of his time shall begin immediately and not be dependent upon the whim or caprice of a Parole Board.

Respectfully submitted,

J. F. KEMP,
CLINT W. HAGER,
Attorneys for Respondents.

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SUPREME COURT OF THE UNITED STATES.

Nos. 782—789.—October Term, 1937.

Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, Petitioner,
782 *vs.*
Sherman Kidwell.

Same,
783 *vs.*
Dewey Smith.

Same,
784 *vs.*
Allen Collins.

Same,
785 *vs.*
Walter Owens.

Same,
786 *vs.*
Frank Peel.

Same,
787 *vs.*
Bennie Jones.

Same,
788 *vs.*
Henry Stone.

Same,
789 *vs.*
Jeffie D. Sullivan.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 16, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Respondents were paroled before completing sentences in Federal prisons.[1] Before expiration of their sentences and while on parole, they committed second Federal offenses, for which they

[1] Some were released with credit for good conduct but are treated as on parole until their maximum terms have expired. 18 U. S. C., Ch. 22, Sec. 716(b).

were convicted, sentenced, and thereafter completely served sentences in the Atlanta Penitentiary. Respondents contend that from the moment of their imprisonment in the Penitentiary under the second sentences, they also began service of the unexpired part of their original sentences. If this contention is correct, respondents have also completely served the unexpired parts of the first sentences.

Petitioner contends, however, that when respondents violated their paroles by committing the second Federal crimes, they were no longer in custody under the first sentences; service of the first sentences was interrupted and suspended and was not resumed before completion of service of the second sentences; and that after completion of the second sentences, the Board of Parole has authority to require completion of the first sentences, service of which ceased due to the interruption by parole violations.

After completion of service of the second sentences, respondents were held in custody by the warden of the Penitentiary under warrants of a member of the Board of Parole alleging violations of parole. The District Court, believing the first sentences "began to run again the moment . . . [respondents were] received at the Penitentiary," discharged respondents from custody on habeas corpus proceedings.[2] The Court of Appeals affirmed.[3] Due to the importance of the question involved, we granted certiorari.[4]

When respondent committed a Federal crime while on parole, for which he was arrested, convicted, sentenced and imprisoned, not only was his parole violated, but service of his original sentence was interrupted and suspended. Thereafter, his imprisonment was attributable to his second sentence only, and his rights and status as to his first sentence were "analogous to those of an escaped convict."[5] Not only had he—by his own conduct—forfeited the privileges granted him by parole, but since he was no longer in either actual or constructive custody under his first sentence, service under the second sentence can not be credited

[2] 19 Fed. Supp. 475. Respondents filed separate petitions for habeas corpus raising substantially identical issues, which will be treated together here, and the respondents will be dealt with as one.

[3] 92 F. (2d) 756.

[4] 302 U. S. —.

[5] Anderson v. Corall, 263 U. S. 193, 196, 197.

to the first without doing violence to the plain intent and purpose of the statutes providing for a parole system.

The Parole Board and its members have been granted sole authority to issue a warrant for the arrest and return to custody of a prisoner who violates his parole.[6] A member of the Board ordered that respondent be taken into custody *after* completion of the second sentence. Until completion of the second sentence—and before the warrant was served—respondent was imprisoned only by virtue of the second sentence. There is, therefore, no question as to concurrent service of sentences, unless—as respondent contends—Section 723(c)[7] required that the unexpired part of respondent's first sentence begin when he was imprisoned under the second sentence. That Section provides:

" . . . The Board of Parole . . . or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

Obviously, this provision does not require that a parole violator's original, unexpired sentence shall begin to run from the date he is imprisoned for a new and separate offense. It can only refer to reimprisonment on the original sentence under order of the Parole Board.

Since service of the original sentence was interrupted by parole violation, the full term of *that* sentence has not been completed. Just as respondent's own misconduct (parole violation) has prevented completion of the original sentence, so has it continued the authority of the Board over respondent until that sentence is completed and expires. Discretionary authority in the Board to revoke a parole *at any time before expiration of a parolee's sentence* was provided—and is necessary—as a means of insuring the public that parole violators would be punished.[8] The proper working of the parole system requires that the Board have authority to discipline,

[6] 18 U. S. C., Ch. 22, Sec. 723(c).

[7] *Id.*

[8] The parole system was intended to make parole discretionary "and revocable at any time . . . [the parole authority] may elect to revoke it," Cong. Rec., Vol. 45, p. 6374. ". . . the prisoner is under the absolute

guide and control parole violators whose sentences have not been completed. It is not reasonable to assume that Congress intended that a parolee whose conduct measures up to parole standards should remain under control of the Board until expiration of the term of his sentence, but that misconduct of a parole violator could result in reducing the time during which the Board has control over him to a period less than his original sentence.

Parole is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency--under guidance and control of the Board.[9] Unless a parole violator can be required to serve some time in prison in addition to that imposed for an offence committed while on parole, he not only escapes punishment for the unexpired portion of his original sentence, but the disciplinary power of the Board will be practically nullified. If the parole laws should be construed as respondent contends, parole might be more reluctantly granted, contrary to the broad humane purpose of Congress to grant relief from imprisonment to deserving prisoners.[10]

Respondents have not completed service of their original sentences and were not entitled to release. The causes are reversed and remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of these cases.

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control of that board, and he may be apprehended and returned at any time on violation of his parole. *Those are the safeguards for the benefit of society.*'' *Id.*, p. 6377.

The governing Act expressly provides that: '' . . . if said [retaken] prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the Board of Parole, and the Board may then, or *at any time in its discretion*, revoke the order and terminate such parole or modify the terms and conditions thereof. . . .'' (Italics supplied.) 18 U. S. C., Ch. 22, Sec. 719.

[9] See Cong. Record, Vol. 45, p. 6374; United States *v.* Murray, 275 U. S. 347, 357.

[10] Cf., United States *v.* Farrell, 87 F. (2d) 957, 961.